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IN THE

# Supreme Court of the United States

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
*Petitioners*,

v.

UNITED AIR LINES, INC.,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Chicago & N.W. Ry. Co. v. Transportation Union*, 402 U.S. 570, 582-83 (1987), this Court held that the "appropriate accommodation" of the Railway Labor Act and the Norris-LaGuardia Act is to allow issuance of an injunction against a union in a RLA § 2 First case only where such an injunction is the "only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements." The question in this case is:

Whether in an RLA § 2 First "concerted job action/work slowdown" case, the standard for the issuance of an injunction against the union is the surface requirement that the injunction be the "'sole effective means' of enforcing [the Union's] duties under the status quo provisions of the RLA," or the more searching requirement that the injunction be the "only practical, effective means" of remedying the § 2 First violation in question—here a work slowdown by employees who were not acting at the union's behest and were not subject to the union's control.

## PARTIES TO THE PROCEEDING

In addition to petitioner, International Association of Machinists and Aerospace Workers, a defendant in the District Court and an appellee in the Court of Appeals and respondent United Air Lines, Inc., the plaintiff in the District Court and the appellant in the Court of Appeals, all the following—who are petitioners in this Court and were defendants in the District Court and appellees in the Court of Appeals—are parties to this proceeding

District Lodge 141-M, IAMAW
Air Transport Employees Local Lodge 1781, IAMAW
IAMAW Rocky Mountain Aircraft Lodge 1886
IAMAW Hoosier Air Transport Local Lodge 2294
IAMAW Local Lodge 1487
Scotty Ford
Richard D. Johnsen
Ronald W. Shepard, Jr.
Timothy W. Gillespie
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## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit in *United Air Lines, Inc. v. International Association of Machinists and Aerospace Workers, AFL-CIO, et al.*, 243 F.3d 349 (7th Cir. No. 00-4220).

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 243 F.3d 349, and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a. The transcript of the unreported oral order of the United States District Court for the Northern District of Illinois, Eastern Division, denying United Air Lines' motion for a preliminary injunction, is reproduced at Pet. App. 34a.

## JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was issued March 14, 2001. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the Court of Appeals on April 11, 2000. Pet. App. 41a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

## STATUTES INVOLVED

Section 2 First of the Railway Labor Act, 45 U.S.C. §152 First, provides in pertinent part:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 4(a) of the Norris-LaGuardia Act, 29 U.S.C. §104(a), provides in pertinent part as follows:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

## STATEMENT OF THE CASE

Petitioner International Association of Machinists and Aerospace Workers ("IAM" or "the Union") is the certified exclusive bargaining representative for the class and craft of mechanics and related workers employed by respondent United Air Lines ("United" or "the Airline"). Pet. App. 2a.

In 1994, IAM and United consummated a six-year collective bargaining agreement ("CBA") that, by its terms, could not be amended until July 12, 2000. Pet. App. 2a.

Five and a half years into the 1994 CBA's term, in December of 1999, IAM and United began negotiations on amendments to the CBA. The parties, however, were unable to reach agreement by the July 12, 2000 amendable date, and continued to negotiate past that date. Pet. App. 2a. Then, in September of 2000, the parties applied to the National Mediation Board ("NMB") for mediation pursuant to § 5 of the Railway Labor Act ("RLA"), 45 U.S.C. § 155. *Id.* After contentious negotiations through the mediation process failed to result in agreement, on November 7, 2000, IAM announced that the Union was seeking a release from mediation that would begin the 30-day "cooling-off" period under the RLA, after which IAM would be free to strike. *See* RLA § 5 First.

Three days after IAM sought a release from the NMB, United complained in a November 10, 2000 letter to the Union, that for several months IAM had engaged in a "work slowdown" in violation of RLA §2 First.[1] Pet. App. 3a. One week later, on November 17, 2000, United filed suit against the Union, alleging an IAM work slowdown in violation of RLA § 2 First, and seeking a temporary restraining order ("TRO") and a preliminary and permanent injunction to compel IAM to end the alleged slowdown. Pet. App. 4a.

In support of its motion, United relied on (i) statistical evidence of increased delays and cancellations of flights over a period of several months correlated to increased incidence of mechanics calling in sick, refusing voluntary overtime, following the letter of safety requirements, and writing up maintenance items right before flight time; (ii) flyers and bulletins on IAM letterhead or posted on IAM bulletin boards, which *inter alia*, told mechanics to "work safe;" [2] and

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[1] RLA § 2 First provides in pertinent part that "[i]t shall be the duty of all carriers [and] their . . . employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes . . in order to avoid any interruption to commerce or to the operation of any carrier . . ."

[2] For example, on October 13, 2000, the IAM negotiating committee sent out a bulletin stating:

> This week we can report that almost no progress was accomplished . . . Your Committee has made it clear that any company proposal involving job concessions not withdrawn would place these negotiations in jeopardy and could result in the IAM seeking self-help . . . We have been made aware of several incidents of aircraft damage around the system. Luckily no employees have been injured. We hope that the stress and anxiety of these contract negotiations have not been contributing factors. We need to remind every employee that **SAFETY COMES FIRST!** We don't need aircraft damage and certainly do not want anybody injured. **PLEASE WORK SAFE,** Take no part in any job action, don't

(iii) a number of flyers and bulletins *not* on IAM letterhead, and *not* posted on IAM bulletin boards, which explicitly called for work slowdowns and refusals to work overtime.[3] Pet. App. 6a-10a.

Although United alleged that the slowdown had begun in July and continued thereafter, the Airline waited until November 17—the Friday before Thanksgiving—to bring suit, to file its injunction papers, and to argue that an immediate TRO was necessary to avoid travel delays over the holiday. Confronted with the litigation situation structured by United, and without affording IAM any opportunity for a meaningful response, the District Court issued a TRO that same day. The TRO prohibited IAM from "calling, permitting, instigating, authorizing, encouraging, participating in, approving or continuing" any work slowdown, and directed IAM, *inter alia*, to post the TRO, to notify all United mechanics and related workers of the TRO, and to direct all such employees to return to a normal work schedule. The District Court also scheduled a hearing on United's motion for a preliminary injunction for December 13, 2000.

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believe in rumors, and remain solid behind your Committee. [Pet. App. 6a-7a].

Other similar bulletins were sent or posted during October and November. Pet. App. 7a-9a. IAM presented undisputed evidence that in early October, United had approached members of the IAM negotiating committee to inform them of two serious accidents that had occurred, and that the safety memos were in response to that notification. Third Supplemental Declaration of Scotty Ford ¶ 3.

[3] One such bulletin stated: "Turn up the heat! No overtime . . . No four overs . . . No easy-hours. . . No early starts . . . No working through lunch". Exhibit 13 to the Affidavit of United Vice President of Line Maintenance William Norman ("Norman Affidavit"). Another stated: "Actions to be taken [during the upcoming holiday travel season] will include massive slow downs and delaying tactics. . ." Norman Affidavit, Exhibit 16. *See also id.*, Exhibit 14 ("Its time to turn up the heat . . . let's screw the bastards royally").

On Tuesday, November 21, 2000, IAM filed seven declarations that: (i) detailed IAM actions taken to comply with the TRO, including posting the TRO, notifying the United mechanics and related workers of the issuance of the TRO, and directing compliance with its terms; and (ii) denied IAM responsibility for the alleged work slowdown. Pet. App. 12a. In addition, prior to the hearing on the preliminary injunction, IAM filed supplemental declarations establishing as an undisputed fact that beginning immediately prior to July 12, 2000, and continuing through the period of negotiations, the IAM had explicitly "encourag[ed] members to work overtime," and had urged its members to "take no part in any job action."[4] In addition, IAM laid out undisputed facts establishing that a rival union, the Aircraft Mechanics Fraternal Association ("AMFA"), and the United mechanics who supported AMFA, had repeatedly called for work slowdowns, refusals to work overtime, and sick-outs during the period at issue.[5] And, IAM informed the District Court

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[4] Immediately prior to the July 12, 2000 amendable date of the CBA, IAM sent two e-mails to all United mechanics and related workers "strongly encouraging members to work overtime." Declaration of Timothy Gillespie ¶¶ 2, 4. On July 14, 2000, two days after the amendable date, IAM sent out the message: "The Committee strongly urges each of you *NOT* to take part in any actions that could place your job in jeopardy" and "We encourage you to consider working overtime and place those premium dollars in your personal strike fund." Declaration of President and General Chairman, IAMAW District Lodge 141-M, Scotty Ford ("Ford Declaration") ¶ 6. And in September 11, September 15, October 13, and October 27 publications, IAM urged its members "do not involve yourself in any job action" and "take no part in any job action." Ford Declaration ¶6; Pet. App. 6a, 7a.

[5] Building on dissatisfaction among the United mechanics with the 1994 CBA, AMFA sought to replace IAM in late 1994 by petitioning the National Mediation Board for a representational election, and supported that petition with authorization cards from over fifty (50) percent of United's mechanics and related workers. While AMFA lost the election—the vote was 6,482 votes for IAM and 5,923 votes for AMFA—AMFA has continued to maintain a significant presence at United by

that the communications explicitly calling for work slowdowns that were attached to United's Norman Affidavit, *see supra* n. 3, were neither produced nor distributed by IAM. Ford Declaration ¶ 4. Norman later conceded that he had no evidence to the contrary. Norman Deposition at pp. 85-86

Thus, United's evidence regarding IAM's involvement in any work slowdown reduced to a handful of IAM bulletins issued in October and November that complained about the progress of negotiations and urged mechanics to "work safe." *See supra* n. 2; Pet. App. 6a-9a. United claimed that these bulletins contained a hidden message to mechanics to slow down, while IAM contended that the messages were sent in response to United's October, 2000 notification to the Union of two serious accidents involving mechanics, *see supra* n. 2, and that the safety messages were consistent with the

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stoking dissatisfaction with the 1994 CBA. Declaration of Kenneth Thiede ("Thiede Declaration") ¶¶ 4-9; *United Airlines, Inc.*, 22 NMB 11 (1995).

In May of 2000, moreover, five months into the collective bargaining negotiations, United announced a plan to acquire US Airways. That move was supported initially by IAM, was opposed by AMFA, and was unpopular with many United mechanics who were concerned about their seniority. In opposition to the acquisition, mechanics who supported AMFA called publicly for slowdowns, refusals to work overtime, and sick-outs to protest the acquisition, and those mechanics criticized IAM for not doing the same. Second Supplemental Declaration of Scotty Ford ("Second Ford Declaration") ¶¶ 8-12; *see also* Pet. App. 14a, n.8.

A further cause of unrest among the United mechanics was the Airline's promise in the press, prior to the beginning of the current collective bargaining negotiations, that United would negotiate a "seamless agreement, " meaning that negotiations would be complete and a new contract in place by July 12, 2000. Thiede Declaration ¶11. When the amendable date passed without a contract, individual mechanics in several locations staged sick-outs, which United did *not* claim were caused or encouraged by IAM. Second Ford Declaration ¶¶ 8-12. United disciplined the individual mechanics and the sick-out ended. *Id.*

mechanics' obligations under federal law and with bulletins sent out by United during the negotiations.[6]

Immediately following entry of the TRO, slowdown activity increased significantly, as measured by maintenance write-ups, out-of-service aircraft, maintenance-related flight delays, and flight cancellations due to mechanical problems. Pet. App. 11a.

On the strength of that increase, on November 22, 2000, United moved for contempt sanctions against IAM. The Airline claimed that IAM failure to comply with the terms of the TRO was the cause of the increase in slowdown activity. Pet. App. 12a. IAM responded that the Union had fully complied with the TRO's commands, and that the statistics simply reflected the fact that IAM was not responsible for, and had no control over, any slowdown activity.

On November 27, 2000, the District Court held a telephonic conference with the parties at which that court directed United to identify the specific mechanics who had engaged in inappropriate behavior, and admonished IAM to ". . . put out . . . specific communications in those areas where there appears to be continued job actions that you do not approve," and " to take appropriate aggressive actions in those instances where the company has pointed out continued work actions are taking place." November 27, 2000

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[6] For example, United stated in a publication to its San Francisco maintenance facility:

> *SAFETY IS OUR TOP PRIORITY*
>
> This is the time when we all need to focus on *SAFETY FIRST* in all we do . . . There was an announcement of a potential merger with US Airways, and negotiations continue with ALPA and the IAM. Needless to say, there is much going on and this is a concern as it may divert attention from us *SAFELY* performing our aircraft maintenance mission. [Deposition of Frederick Mohr, Ex. 8 (emphasis in original)].

Transcript at 10-11. United subsequently identified a total of 144 mechanics (out of a bargaining unit of 16,000) who allegedly had engaged in slowdown activities, and asked IAM to "counsel them." Pet. App. 12a-13a.

After December 1, 2000, the number of write-ups, the number of out-of-service aircraft, the percentage of flights delayed for mechanical reasons, and the percentage of maintenance-related flight cancellations all decreased to levels that were lower than those in early November, although still significantly higher than the historical average. Pet. App. 13a. United claimed that the decrease was due to increased efforts by IAM to stop the slowdown; IAM claimed that it resulted from United's long overdue decision to take disciplinary action against individual mechanics and United's efforts to stop AMFA calls for a slowdown. Pet. App. 13a.

On December 7, 2000, the District Court *sua sponte* dissolved the TRO, finding that ". . . the [TRO] has been somewhat ineffective in requiring the mechanics to do their jobs appropriately. . ." Pet. App. 15a. The District Court noted that it "does not wish to have an impact on ongoing negotiations between that labor organization [IAM] and the Company," December 7, 2000 hearing transcript at 26-27, and that the "urgency" relating to "pending travel over the Thanksgiving holidays" had dissipated, Pet. App. 15a.

After the TRO was dissolved, the incidence of delays and cancellations continued to decrease. Pet. App. 39a.

On December 13, 2000, the District Court denied both United's motion for contempt and its motion for a preliminary injunction. The District Court noted that there had been "no detrimental impact [from] the dissolution of the temporary restraining order;" Pet. App. 39a, and explained that an injunction against IAM would not be an effective or practical means of controlling persons responsible for the slowdown:

> [T]he facts in this case have convinced the court that there are some members of their union who despite their [*i.e.*, IAM's] best efforts have continued to, and perhaps will continue to, act inappropriately and to do these job actions which are not proper.
>
> * * * *
>
> As to the motion for the preliminary injunction, again, going back to what I believe is perhaps the most effective way to deal with, I find, a certain element of the Union which is resistant to leadership, I think those persons, as I suggested previously, had to be identified, the Union needed to be notified of who those persons were, and appropriate action should be taken against the individuals who are continuing to impact United in its ability to service its customers.
>
> * * * *
>
> I think those actions in which certain individuals who have been identified as writing up safety violations inappropriately or failing to do them timely, those persons being identified and subjected to immediate consequences I think is the best way and maybe the only way to insure that the majority of the members of the Union continue to act appropriately in this case. [Pet. App. 37a-39a].

United appealed the District Court's denial of the motion for a preliminary injunction to the Seventh Circuit. United's theory on appeal was that,

> [s]ince the court found that some of its mechanics were engaging in a concerted job action (that is, a deliberate slowdown) during the mediation process, United was entitled under the RLA to an injunction ordering the union to make every reasonable effort to stop the slowdown even if it could not be determined whether the

> injunction against the union would have been entirely effective in ending it. [Pet. App. 21a.]

The Seventh Circuit "agree[d] with United," *id.*, that the Airline was entitled to an injunction against IAM on a showing that "a number of mechanics were 'do[ing] job actions which are not proper' and acting 'in concert' or in a 'mob mentality,'" and that IAM had been "involved in the [job action] work slowdown." Pet. App. 25a-27a.[7] *See also* Pet. App. 22a ("Once a court determines that such a concerted work action is occurring in violation of the RLA, an injunction can issue ordering the union to observe its statutory duty by trying to stop it.").

The Seventh Circuit read this Court's decision in *Chicago & N.W. Ry. Co. v. Transporation Union*, 402 U.S. 570, 582-83 (1971), which states the standard for issuing such a labor injunction, as requiring an inquiry into whether the injunction is the "'sole effective means' of enforcing IAM's duties under the status quo provisions of the RLA." Pet. App. 25a. And, the Court of Appeals rejected the District Court's conclusion that the standard is whether the injunction is the "sole effective means" of remedying the RLA violation in question—the standard under which the District Court refused the injunction on the ground that an order against IAM would not be an "effective" means of "deal[ing]" with the "certain element" of the United mechanics who were outside the Union's control and who were engaging in work slowdown activity. *Id.* at 38a. On its view of the law, the

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[7] In this regard, the Court of Appeals found that that IAM had been "involve[d] in the work slowdown," Pet. App. 27a, based on the "work safe" bulletins that were issued on IAM letterhead or posted on IAM bulletin boards, At the same time, the court below did not take any issue with the undisputed evidence that "a rival union" (AMFA) vigorously championed the slowdown, and that the only bulletins that explicitly called for a work slowdown had been posted or distributed by individual mechanics who were not acting for or on behalf of IAM. Pet. App. 10a, 14a n. 8.

court below deemed it irrelevant whether, "by directly disciplining or terminating individual employees . . . United can diminish or even stop the work slowdown through its own actions." *Id.* 21a-22a. So long as there might be some "additional positive effect" that derives from an injunction against IAM, issuance of the injunction was required. *Id.* at 31a. The Seventh Circuit therefore reversed the District Court and remanded "with instructions to enter the preliminary injunction against IAM." *Id.* at 33a.

## REASONS FOR GRANTING THE WRIT

A. The Seventh Circuit's decision opens a wide Railway Labor Act §2 First avenue affording employers free and easy access to precisely the kind of federal court injunction against a union/exclusive bargaining representative precluded by Norris LaGuardia Act § 4—*viz.* an "injunction in [a] case involving or growing out of [a] labor dispute to prohibit any person or persons participating . . . in such dispute . . . from . . . singly or in concert . . . ceasing or refusing to perform any work . . ."

The Court of Appeals opened that way by dismantling the barrier to the improvident issuance of such labor injunctions crafted by this Court in *Chicago & N.W. Ry. Co. v. Transportation Union*, 402 U.S. 570, 582-83 (1971), as the "appropriate accommodation" of RLA § 2 First and Norris-LaGuardia § 4—that an injunction within Norris-LaGuardia § 4's coverage can issue in an RLA § 2 First suit only where "such a remedy is the *only practical, effective means* of enforcing the duty to exert every reasonable effort to make and maintain agreements," (emphasis added).

According to the Court of Appeals, in an RLA § 2 First case such as this one, the issuance of an injunction against the union is always proper and follows automatically from an employer's showing that a "concerted work action is occurring in violation of the RLA." Pet. App. 22a. The

Court of Appeals' ruling makes the careful balance this Court struck between RLA § 2 First and Norris-LaGuardia § 4 in *Chicago & N.W. Ry. Co.* an "appropriate accommodation" between the two statutes in name only.

The decision below is thus utterly irreconcilable with *Chicago & N.W. Ry. Co.*, and could not be more wrong. And this is not a situation—serious enough in itself—where the Court of Appeals has failed to follow a formal rule of law of narrow consequence stated by this Court.

The *Chicago & N.W. Ry. Co.* accommodation of RLA § 2 First and Norris-LaGuardia § 4 is forged out of "weighty considerations counsel[ing] restraint" in the exercise of the federal courts' equitable powers in labor disputes—considerations born of the misuse of the equity courts by employers during the era of government by injunction. As the *Chicago & N.W. Ry. Co.* Court recognized, allowing employers to involve the federal courts in labor disputes through RLA § 2 First suits seeking injunctions against concerted activity "creates a not insignificant danger that parties will structure their negotiating positions and tactics with an eye on the courts, rather than restricting their attention to the business at hand," and raises the specter of "freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place." 402 U.S. at 583.

The Court of Appeals' ruling utterly disregards these considerations and legitimizes the tactical lawsuits to strengthen an employer's economic position in a labor dispute that have always marked labor injunction litigation—and that have always had the most deleterious effect on the fair resolution by the parties of these disputes and the just administration of the labor laws by the federal courts.

As this suit, filed four months after the alleged RLA § 2 First violation began, one week after IAM sought release from the RLA mediation process, and on the Friday prior to

the Thanksgiving holiday, vividly demonstrates, RLA employers have every incentive to bring tactical RLA § 2 First injunction suits—*viz.*, every incentive to seize an opportune time during the long drawn-out RLA bargaining processes to bring a suit alleging that there have been employee concerted job actions that the union has suggested, has instigated, or, by inaction, has condoned, and that the court should issue an injunction ordering the union to effectuate an end to the job actions—an injunction backed up by the contempt power.

Such an injunctive order puts the union—the employees' representative against management—into the anomalous position of the employer's agent charged by the court with seeing to it that employees do their work as management wants the work done. Such an order relieves the employer of its managerial responsibilities and drives a wedge between the union and the employees which weakens the union as an effective employee representative. And, such an order subjects the union at any point to an employer citation for contempt alleging that the union has not brought an end to the job actions and is thus not doing what it is required to do by the injunction. Of course, and very much to the point, such a lawsuit, such an order, and the policing of the order deeply enmesh the federal district court in the parties' labor relations and in their collective bargaining dispute.

Given all this, experience demonstrates that, with the slightest encouragement, RLA employers will routinely call on the federal courts through RLA §2 First lawsuits like this one to place unions under injunctive commands to put an end to concerted work actions including concerted work actions the union did not in fact command and cannot effectively control. Where such injunctions are issued, the threat of contempt sanctions—which is the real object of employer requests for injunctions in cases of this nature—will have a draconian and improper *in terrorem* effect on

unions faced with the risk of contempt citations for such work actions. Through such RLA § 2 First lawsuits, then, employers will enmesh the federal courts in their labor disputes and their labor relations and enlist the federal courts injunctive powers to augment their bargaining power—in direct contravention of the core policies of the Norris-LaGuardia Act.

The Seventh Circuit's decision here—by ruling that in RLA § 2 First suits, injunctions against the union are to be granted automatically on a finding of "a concerted work action . . . in violation of the RLA," without regard to whether the injunction will be at all effective in stopping the slowdown, reads the *Chicago & N.W. Ry. Co.* limitation on the issuance of such injunctions out of the law. The decision below goes well beyond giving employers an opening to file such suits, it invites employers to do so.

Given the importance of the *Chicago & N.W. Ry. Co.* accommodation of RLA § 2 First and Norris-LaGuardia § 4 to the integrity of the federal courts' role in enforcing the national labor policy, and the deleterious effects of the Seventh Circuit's emasculation of *Chicago & N.W. Ry. Co.*'s limitation on injunctions against unions in RLA § 2 First "concerted work action" cases on both the litigation system and the collective bargaining system, the decision below requires review and correction by this Court.

B. The Seventh Circuit's decision—which is irreconcilable with this Court's *Chicago & N.W. Ry. Co.* decision and which unhinges the careful balance between § 4 this Court struck in *Chicago & N.W. Ry. Co.*—is wrong in both its reasoning and its result.

(1) This case and *Chicago & N.W. Ry. Co.* lie at the same intersection of "two statutes with purposes that lead in opposing directions" 402 U.S. at 582: (1) RLA § 2 First, which directs unions and employers "to exert every

reasonable effort to make and maintain agreements. . . and to settle all disputes;" and (2) Norris-LaGuardia § 4, which denies the federal courts jurisdiction to issue "injunction[s] in [a] case involving or growing out of [a] labor dispute to prohibit any person or persons participating . . . in such dispute . . . from . . . singly or in concert . . . ceasing or refusing to perform any work . . . ."

The RLA, for its part, sets forth a detailed set of procedures which the parties to a transportation labor dispute must exhaust before either side can engage in self-help.[8] RLA § 2 First is one component of this statutory scheme and has been read by this Court as part of an "integrated, harmonious scheme for preserving the status quo from the beginning of a major dispute through the final 30-day 'cooling off' period." *Shore Line v. Transportation Union*, 396 U.S. 142, 152 (1969).

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[8] This Court outlined the RLA procedures as follows:

> The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10. [*Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 378 (1969).]

At the same time, the Norris-LaGuardia Act, "expresses a basic policy against the injunction of activities of labor unions." *Machinists v. Street*, 367 U.S. 740, 772-773 (1961). And Norris-LaGuardia § 4 denies the federal courts jurisdiction to issue injunctions in labor disputes to prohibit employees from "ceasing or refusing to perform any work."

(2) RLA § 2 First and Norris-LaGuardia § 4 could not be in greater tension and in *Chicago & N.W. Ry. Co.*, this Court "trace[d] out . . . the uncertain line of appropriate accommodation of [the] two statutes." 402 U.S. at 582. There, the railroad brought a RLA § 2 First suit against the union alleging the union's failure to "exert every reasonable effort to make and maintain agreements . . ." during bargaining, and seeking as a remedy for that violation an injunction prohibiting the union from striking in support of its contract demands following its release from mediation. *Id.* at 571-72. The *Chicago & N.W. Ry. Co.* Court held that §2 First does create a legal collective bargaining obligation that is enforceable by the federal courts through, *inter alia*, proper injunctive remedies. 402 U.S. at 577-80.

Where, however, as in *Chicago & N.W. Ry. Co.*, and as in this case, a plaintiff seeks an injunction to enforce RLA § 2 First that would otherwise run afoul of Norris-LaGuardia § 4, the Court found "weighty considerations [which] counsel restraint." 402 U.S. at 583. Accordingly the Court held that such an injunction may *not* issue unless "such a remedy is the *only practical, effective means* of enforcing the duty to exert every reasonable effort to make and maintain agreements." *Id.* (emphasis added) *See also Burlington No. R. Co. v. Maintenance Employees*, 481 U.S. 429, 446 (1987)("Even when a violation of a specific mandate of the RLA is shown, '[c]ourts should hesitate to fix upon the injunctive remedy . . . unless that remedy alone can effectively guard the plaintiff's right.'") (quoting *Street*, 367 U.S. at 773).

(3) As the District Court correctly recognized in denying United an injunction against IAM, in this case "such a remedy"—an injunction within Norris-LaGuardia § 4's terms—is *not* "the only practical, effective means" of enforcing RLA § 2 First. Indeed, in the circumstances here, such an injunction is not a practical, effective remedy at all.

United sought an injunction against IAM requiring the Union to take action that would put an end to a "work slowdown" ostensibly on the basis of the breach of the Union' RLA § 2 First duty "to maintain agreements" during the status quo mediation/collective bargaining process. But the undisputed facts established: first, that to the extent IAM was responsible for the slowdown at all, the Union was not principally responsible; and second, that given its true genesis and nature, IAM did not have the effective power to end the work slowdown. In the end, as the District Court learned from its superintendence of the TRO issued the day the lawsuit was filed, United's complaint was against a job action instigated by a rival outside union—AMFA—not IAM, and any work slowdown was by United mechanics who were AMFA supporters. That being so, it was United, not IAM, that had the only effective power—disciplining those employees—to deal with the "work slowdown.".

It follows, as the District Court concluded, that an injunction against IAM was not a "practical, effective means" for enforcing RLA § 2 First at all, much less the "*only practical and effective*" remedy.

(4) In reversing the District Court, the Seventh Circuit ruled that in an RLA § 2 First "concerted job action" case like this one, an injunction against the union follows automatically from a finding that "a concerted work action is occurring in violation of the RLA." Pet. App. 22a. The Seventh Circuit gave two reasons for its ruling; neither can bear a moment's inspection.

(a) Most generally, the court below concluded that in an RLA § 2 First concerted job action/work slowdown case, *Chicago & N.W. Ry. Co.* calls for inquiry into whether an injunction against a union is the "'sole effective means' of enforcing [the Union's] duties under the status quo provisions of the RLA," Pet. App. 25a, and not into whether the injunction is the "only practical, effective means" of remedying *the violation of § 2 First in question—viz.* the work slowdown in this case by dissident United mechanics who were not under IAM's control.

The Seventh Circuit's effort to press *Chicago & N.W. Ry. Co.*'s language—that an injunction may only issue if the injunction is the "only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements"—into its service fails. The Court of Appeals' reading of the *Chicago & N.W. Ry. Co.* requirement for the issuance of a labor injunction reduces that requirement to a meaningless tautology.

By definition an injunction against a union ordering the union to fulfill its RLA § 2 First duties is a means "of enforcing" those duties. And, since it goes without saying that a party should fulfill its statutory duties, the injunction is a legally proper order in a very narrow sense. The injunction, moreover, is the "sole effective means" of achieving its ends in that such an order backed by contempt is the only kind of coercive order to obey § 2 First's mandates an equity court is empowered to issue against a union in an RLA § 2 First lawsuit. If those surface conditions for the issuance of a labor injunction are all that *Chicago N.W. Ry. Co.* requires, then it adds nothing to the normal requirements of equity at all.

Reading its requirement as a whole, what *Chicago & N.W. Ry. Co.* in fact mandates is an inquiry into whether, given the § 2 First violation, the injunction is *both proper and necessary* to assure that the union ends the violation and brings itself into conformity with § 2 First's commands; not, as the Seventh Circuit would have it, an inquiry into whether

an injunction is an effective means of enforcing the RLA by giving added force to § 2 First's commands—an inquiry that will always be answered in the affirmative.

What *Chicago & N.W. Ry. Co.* adds to normal equity practice, and adds in order to accommodate the RLA to the Norris-LaGuardia anti-injunction policy, is the requirement that the injunction be the "only practical and effective" remedy—*viz.* that an injunction against a union in the face of Norris LaGuardia §4 be truly necessary to end the RLA § 2 First violation. The Seventh Circuit's ruling leaves nothing of that additional requirement on the issuance of injunctions in RLA § 2 First cases.

b. In a variation on the same theme, the Seventh Circuit faulted the District Court for treating as material to the *Chicago & N.W. Ry. Co.* inquiry "[w]hether United can diminish or even stop the work slowdown through its own actions." Pet. App. 22a. In the Court of Appeal's view, "requiring United to take efforts to end the slowdown . . . would be requiring United to assume IAM's [RLA § 2 First] duty altogether." *Id.*

This is a total *non sequiter*. The District Court did not impose any requirement on United, much less "requir[e] United to take efforts to end the slowdown." What the district court did, as *Chicago & N.W. Ry. Co.* requires, was to take account of the entire situation in determining whether an injunction against the union was the "only practical, effective means" of ending the slowdown. In taking that account, the District Court recognized that the slowdown activities in question were by United mechanics who were supporters of a rival outside union (AMFA), who were *not* acting at IAM's behest, who were *not* subject to IAM's control—but who most certainly were subject to *United's* control. In this situation, by definition, IAM had no independent RLA § 2 First duty to end these mechanic's work slowdown activities, and the District Court's determination not to issue an

injunction against IAM cannot possibly be said to "require United to assume IAM's duty altogether."

* * * *

The sum of the matter is that the Seventh Circuit has read *Chicago & N.W. Ry. Co.*'s "only practical, effective means" limitation on the issuance of injunctions in RLA § 2 First "concerted job action" cases out of the law. Under the Court of Appeals ruling, § 2 First injunctions against unions will be entered routinely, even when the injunction is not an effective means—let alone the "only" such means—to end the concerted work activity. As we have stressed, that result totally overrides Norris-LaGuardia's anti-injunction policy and destroys the careful RLA § 2 First/Norris-LaGuardia § 4 balance struck in *Chicago & N.W. Ry. Co.*

## CONCLUSION

For the foregoing reasons, petitioner International Association of Machinists and Aerospace Workers, *et al.* respectfully requests that the Court grant the Petition for Certiorari.

Respectfully submitted,

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# APPENDICES

# APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 00-4220

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UNITED AIR LINES, INCORPORATED,
*Plaintiff-Appellant*,

v.

INTERNATIONAL ASSOCIATION OF MACHINIST AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 141-M, IAMAW, AIR TRANSPORT EMPLOYEES LOCAL LODGE 1781, IAMAW, *et al.*,
*Defendants-Appellees*.

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Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 00 C 7265—William J. Hibbler, *Judge*.

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Argued February 22, 2001—Decided March 14, 2001

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Before Bauer, Coffey, and Manion, Circuit Judges.

Bauer, Circuit Judge. United Airlines ("United") appeals from the denial of a preliminary injunction which it had sought against the International Association of Machinist and Aerospace Workers, AFL-CIO ("IAM") in order to compel IAM to exert every reasonable effort to discourage its member mechanics from engaging in a concerted work slowdown at United. For the reasons set forth below, we reverse the decision of the district court.

## BACKGROUND

United is a "carrier" as defined by § 201 of the Railway Labor Act ("RLA"), 45 U.S.C. § 181. IAM is the certified exclusive bargaining representative of six different crafts or classes of United employees, including the mechanics craft or class. In 1994, IAM and United negotiated a collective bargaining agreement ("CBA"), which by its terms became amendable on July 12, 2000 The parties entered into negotiations in December of 1999 but were unable to reach an agreement by July 12, 2000.

In September of 2000, United and IAM jointly applied to the National Mediation Board ("NMB") for mediation pursuant to § 5 of the RLA, 45 U.S.C. § 155. The RLA requires both parties to maintain the status quo during mediation (that is, it forbids either party from unilaterally altering the working conditions in place, broadly defined). Negotiations between the parties broke off on October 31, and resumed on December 7. The talks continue as of the time of this decision.

Beginning shortly after July of 2000, and continuing in varying degrees up to the present time, United has experienced various maintenance-related anomalies which it interprets as a deliberate "slowdown" campaign on the part of its mechanics. Specifically, United has experienced a greater than normal number of maintenance write-up [1] by mechanics, longer than usual "cycle times" [2] at its Indianapolis Maintenance Center, a sharp increase in the number of

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[1] A maintenance "write-up" is a written record by a mechanic of any item on an aircraft that may have a defect or a condition requiring further inspection or repair. Some write-ups identify serious defects that may affect airworthiness and therefore must be repaired immediately. Others involve merely trivial or cosmetic defects, such as broken tray tables or scratched paint, which can be repaired at a later time.

[2] A "cycle time" is the time that it takes to perform a scheduled maintenance check.

aircraft held out of service for unscheduled maintenance,[3] and an increase in maintenance-related flight delays and cancellations. By November 10, 2000 United suspected that IAM was directing or encouraging the work slowdown, and on November 10, 2000 United Senior Vice President Andrew Studdert wrote a letter to IAM District Lodge 141-M General Chairman Scotty Ford calling on the union to halt what he called the "concerted job action by employees represented by District Lodge 141-M." In the letter, Studdert complained that IAM employees were submitting excessive mechanical write-ups making erroneous claims of missing equipment, and failing to work scheduled overtime. Studdert characterized the mechanics' conduct as "clearly concerted and appear[ing] to be in direct response to misleading communications from the IAM about the Company's position at the bargaining table, inaccurate descriptions of other management decisions, and clear 'work to rule' campaign directives from District Lodge 141-M." Studdert then reminded Ford of IAM's duties under the RLA to maintain the status quo during ongoing negotiations, and noted that IAM's failure to observe this duty was illegal and enjoinable in federal court. Finally, Studdert requested IAM and its members to return to the status quo immediately. He demanded an immediate end to IAM communications containing misleading information about United's bargaining positions, as well as "an immediate end to work to rule directives, and any other steps necessary to secure an immediate end to this disruptive behavior."

On November 14, 2000, Scotty Ford sent Studdert a letter in response. In the letter, Ford stated that he "greatly resent[ed] what can only be seen as an attempt to threaten and intimidate this Union and its members during these negotiations." Ford denied that IAM had encouraged any

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[3] The number of aircraft out of service for an unscheduled maintenance check is a function of two factors: the number of maintenance write-ups, and the amount of time that it takes the mechanics to repair the defects.

employee to violate either the CBA or the RLA, and he requested Studdert to present specific evidence that either the District or any of its officers were doing so. Ford asserted that recent communications from the IAM District 141-M Negotiating Committee had "repeatedly advised the [union] membership not to take part in any job action and had gone so far as to recommend that members work overtime." Ford contended that recent actions by United management (including the discharge of 108 mechanics in Los Angeles") were the "true reason behind any so-called 'disruptive behavior'" on the part of IAM mechanics, and he accused United of trying to "censor" IAM communications.

One week later, United moved for a temporary restraining order ("TRO") and a preliminary injunction. United asked the court to prohibit United's mechanics from engaging in a slowdown campaign and to order the IAM, its district and local lodges, and their officers to take specific steps to stop ongoing slowdown activity. In support of its motion, United produced three categories of evidence: (1) statistical evidence of a slowdown campaign, along with testimony by United managers describing their personal observation of slowdown activities by mechanics; (2) letters and bulletins issued by IAM District Lodge 141-M and IAM's local lodges during October and November 2000 which United claimed constituted a deliberate slowdown campaign directed by IAM; and (3) letters and flyers posted by individual mechanics during the same period that encouraged work slowdowns and other job actions. These categories of evidence are addressed in turn.

(1) Statistical evidence of a slowdown/managerial testimony

United's statistical evidence revealed the following: (1) a jump in the number of maintenance write-ups from historical levels of 1050-1100 maintenance items per day to 1350 per day in July of 2000, and climbing to almost 1500 per day during the first two weeks of November (after the contract

talks broke off); (2) an increase in cycle times for scheduled maintenance checks at United's Indianapolis Maintenance Center beginning in July and rising to almost double their historical averages during September through November 2000; (3) an increase in the number of aircraft held out of service for unscheduled maintenance at any given point from the historical average of roughly 12 to nearly 30 in July, followed by a slight decrease in September through November, and a subsequent increase to 35 a day during the first two weeks of November; (4) an increase in the percentage of United flights that are delayed due to mechanical problems from the historical average of roughly four percent to over seven percent in July through August 2000, then dipping to six percent in September and October, and climbing again to approximately eight percent during the first two weeks of November; (3) A doubling of the percentage of flight's cancelled due to mechanical problems from the historical average of roughly one percent to over 2.5 percent in July through August 2000, followed by a decline to approximately 1.5 percent in September and October, and another increase to two percent during the first two weeks of November.[4]

In addition, United produced testimony from the managers at each of United's large and medium-sized maintenance bases, many of whom described their personal observations of mechanics making repeated and unnecessary references to maintenance manuals, refusing en masse to work voluntary overtime, writing up maintenance items immediately before flight time (causing delays and cancellations), and writing up cosmetic defects which ordinarily would be ignored, such as torn foot rests, worn arm rests, and chipped paint.

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[4] According to an economist retained by United, the odds that the increases in cancellations and delays could be caused by random, coincidental behavior by United's mechanics were less than one in a trillion.

(2) Letters and bulletins issued by IAM District Lodge 141-M and other local lodges

On October 3, 2000, District Lodge 141-M—the body authorized by IAM to negotiate the CBA between the mechanics and United—sent a bulletin to all IAM aircraft maintenance personnel stressing the importance of ensuring that aircraft be in airworthy condition before being returned to service as required by the federal aviation regulations. The bulletin noted "apparent inconsistencies in the procedures of reporting maintenance discrepancies on United Airlines aircraft." Specifically, it noted that according to IMCOP operating procedures, mechanics should report discrepancies to the Airframe team leader or the lead mechanic "to determine whether a write-up is necessary," but the Administrative and Operating Policy suggested that write-ups can be generated by dock personnel. The bulletin urges individual technicians to write up problems and to repair, replace, or defer the discrepancy if necessary, and it further exhorts the mechanics: "If you find something wrong on an aircraft, ACTION MUST BE TAKEN!" (emphasis in original). First Norman Aff. para. 8, Exhibit 1.

On October 13, District Lodge 141-M sent a bulletin to its member mechanics under the prominent title "Negotiations." The bulletin opens by describing the recent progress of the negotiations between United and the IAM (which it casts in a negative light), and proceeds to admonish member mechanics to "work safe":

> This week we can report that almost no progress was accomplished . . . Your Committee has made it clear that any company proposal involving job concessions not withdrawn would place these negotiations in jeopardy and could result in the IAM seeking self-help. . . . We have been made aware of several incidents of aircraft damage around the system. Luckily, no employees have been injured. We hope that the stress and anxiety of

> these contract negotiations have not been contributing factors. We need to remind every employee that SAFETY COMES FIRST! We don't need aircraft damage and certainly do not want anybody injured. PLEASE WORK SAFE, take no part in any job action, don't believe rumors, and remain solid behind your Committee.

United introduced testimony from some of its maintenance officials that phrases such as "work safe" are commonly recognized by United mechanics as code words calling for a work slowdown.

A posting on the IAM website during the same time period echoed this message to "work safe." An October 27 website posting by the District 141-M negotiating team recounts the recent status of negotiations, and then reminds members to" not believe rumors," "be supportive,""[w]ork safe," and "[t]ake no part in any job action." *Id.* at para. 10, Exhibit 3. In addition, a November 10 posting on the same website reported that the NMB had adjourned the current round of negotiations, and stated that United had not submitted realistic wage proposals. It announced that IAM had called for are lease from further negotiations "in order to begin the 30-day countdown," and quoted Ford as saying: "We do not believe United will bargain seriously without additional pressure . . . . After 6 years of dedication and sacrifice by IAM members and 6 years of historic profits by United, it's payback time . . . . The sooner United understands that the better." The posting concluded: "while the Railway Labor Act allows for near-endless negotiations in the airline industry, the membership of this union does not." *Id.* at para. 11, Exhibit 4.

On October 19, 2000, one of IAM's local lodges issued a bulletin which stated:" The company started its 'job action letter campaign' Tuesday in retaliation to the I.A.M. Negotiating Committee's update of October 13, stating

WORK SAFE! This has obviously made the company upset." The bulletin went on to excoriate United for its strong-armed management techniques, and asserted: "The ugly truth is we are at war, all out war!" *Id.* at para. 13, Exhibit 6.

United also presented bulletins and memos which it claimed were issued by other IAM Local Lodges[5] that stressed the "safety first" message even more emphatically. For example, a bulletin which purported to come from IAM Local Lodge 1781 prominently displayed the words "Safety First" twice and stated:

> We must work even harder at performing our jobs in a safe manner . . . . We must also be aware that we have a responsibility to comply with the many FAA and CAL/OSHA regulations required to perform our daily jobs, no matter how long it takes . . . . It is imperative that, in these times of stress, uncertainty and distractions; working safely, within our skills, must be our number one concern. NO JOB IS SO URGENT THAT IT CAN'T BE DONE SAFELY. (emphasis in original). *Id.* at para. 14, Exhibit 7.

In late October or early November, three virtually identical bulletins appeared in three separate United maintenance bases under the headings "Negotiations 2000," "Millennium Negotiations," and "Lodge 1781 Strike Committee." One of them appeared on an official IAM bulletin board inside of a locked, glass case. The bulletins read, in part:

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[5] IAM denies that any of its local lodges actually issued these bulletins or memos, and claimed that they were issued either by individual "dissident" union members without authorization, or by other individuals who were hostile to the IAM and sympathetic to a rival union that had been gaining strength at United and that was trying to replace IAM. In his deposition, United Vice President of Line Maintenance William Norman conceded that he did not know whether they were actually published or produced by IAM lodges or union officials. Norman Dep. at 85-6.

> In keeping with the "Safety First" ideal, it is time for us to examine our tools and equipment. Greasy wrenches could result in personal injuries and damaged parts. Check your boxes and tools. If they haven't been cleaned lately, give some thought to safety and clean them daily.
>
> Some tools need lubrication to work properly. Knives need to be sharpened to work efficiently and safely. Now is the time to take care of these needs.
>
> Machinery and equipment also should be checked for safety. Fork lifts, tugs, drive belts, fitting devices, baggage equipment, food service equipment . . . all should be checked thoroughly. If it isn't safe, shut it down and get it fixed. (emphasis in original).

Finally, a memo bearing the IAM seal and purporting to be from Local Lodge 1487 in Chicago further reinforced the message under the heading of Work Safe. The memo complains of excessive and inappropriate discipline by United which it characterizes as constituting "an environment of intimidation." The memo goes on to say, in part:

> We, as the Grievance Committee, feel obligated to advise you how to stay out of trouble during these oppressive times. We advise you to take the advice given by Scotty Ford, D-141M President and General Chair, on the bulletin dated Oct. 15,2000 and WORK SAFE. Do not let outside influences distract you from the job at hand. The utmost importance must be put on SAFETY so we can return to our families after work.
>
> They created this atmosphere, now we have to deal with it. If you do not follow the rules and procedures you will be disciplined up to and including discharge. For this reason we are asking our members to be careful, follow all procedures and WORK SAFE!!! (emphasis in original.) *Id.* at sec. 16, Exhibit 9.

IAM denies that it issued these bulletins.

(3) Letters and flyers posted by individual mechanics

United also produced a number of leaflets, flyers, and website messages which it claimed were distributed in United's maintenance facilities or directed at United mechanics that explicitly acknowledged and encouraged slowdown activities. For example, a flyer entitled "TURN UP THE HEAT" and addressed to United's CEO, Jim Goodwin, which was posted in San Francisco stated: "We, as professionals, do not enjoy work slowdowns, but you leave us no choice. . . . NO OVERTIME November 21-28[:] 1. Starting 0500 11/21[;] 2. No Four Overs[;] 3. No Easy-Hours[;] 4. No Early Starts[;] 5. No Working Through Lunch. P.S. We will remember those who work!!" *Id.* at para. 20, Exhibit 13. In addition, United claims that it received other flyers on or about November 7, 2000, which stated, respectively: "[L]et's screw the bastards royally. It's time to turn up the heat," and "LET'S MAKE THIS THE HOLIDAY SEASON FROM HELL!!!!!!!!" *Id.* at ¶¶ 21 and 22, Exhibits 14and 15. The third flyer which was signed" IAM AFL/CIO" but was not on IAM letterhead stated: "the members of the International Association of Machinists at United Airlines wish to make it known that they must act aggressively against their company during the upcoming holiday travel season. Actions to be taken will include massive slow downs and delaying tactics beginning in late November, 2000. . . ." *Id.* at sec.23, Exhibit 16. IAM denies issuing any of these flyers.

On November 17, 2000, after hearing argument from both sides, the district court found that United was "likely to succeed on the merits of its claims that Defendants are violating the RLA," that United was suffering "immediate, substantial, and irreparable injury" in the form of lost revenue and consumer goodwill, and that the harm to IAM from the issuance of the TRO would be" inconsequential when compared to the loss and hardship which United and the public will suffer." Accordingly, the court issued a TRO

prohibiting IAM and its members from engaging in or encouraging any kind of slowdown activity or other work action designed to interfere with United's airline operations, and ordering all officers of IAM's district and local lodges to "take all reasonable steps within their power" to prevent the enjoined actions, by (inter alia) notifying all IAM mechanics of the issuance, contents, and meaning of TRO in "the most expeditious means possible," putting this notice on IAM's websites and recorded telephone hotlines, instructing all IAM-represented personnel to resume their normal working schedules and practices, and directing members to end any slowdown activity (and any communications encouraging such activity) upon pain of fine, suspension, or other sanction by IAM. In response to concerns expressed by IAM's counsel that the TRO might discourage IAM mechanics from performing their jobs with their usual care, the court added to the TRO the following sentence: "This notice in no way is meant to have impact upon each mechanic's exercise of their usual diligence in providing appropriate safety for all aircraft."

The TRO was not initially effective. Indeed, the situation appeared to worsen considerably after its issuance. In the days following the TRO: (1) the number of write-ups increased to an average of over1500 per day, with an all-time peak of 2037 on November 22; (2) from November18-30, the average number of out-of-service aircraft increased to 42 with an all-time high of 52 on November 26; (3) during the same period, the number of maintenance-related flight delays increased to 8.8 percent of all flights; (4) in the same period, the number of flight cancellations due to mechanical problems increased to 2.5 percent of all flights. Each of these figures represented an appreciable increase from the corresponding levels for the month before the TRO was issued (which were already substantially higher than historical averages). The parties have differing explanations for this. United believes that IAM failed to comply with the

TRO.[6] IAM claims that it fully complied with the TRO, and argues that the ineffectiveness of the TRO demonstrates that, to the extent that any illegal work action was occurring at all (which IAM did not concede), such action was being performed by dissident mechanics who were not in the union's control.

On November 21, IAM filed the declarations of seven of its officers describing its compliance with the TRO. On the following day, United filed a motion seeking to hold IAM in contempt of the TRO. On November 27, the parties held a telephonic conference with the district court, during which the court instructed United to identify particular individuals who United felt were continuing to act in appropriately, and to inform IAM of who, when, and where such inappropriate actions were taking place in order to facilitate IAM's efforts to implement the TRO. The court also admonished IAM to "do all in its power . . . to effectuate the stoppage of any work action by the mechanics," and to "take appropriate aggressive actions in those instances where the company has pointed out continued work actions are taking place." Shortly thereafter, United supplied IAM with the names of 144 mechanics

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[6] United claims that IAM posted the TRO only on their websites, that they did not direct member mechanics to cease all slowdown activity and all communications encouraging such activity upon pain of fine, suspension or other sanction by IAM, that the website bulletin that IAM did release implicitly encouraged continuation of the slowdown (by stressing the continued need for mechanics to observe all safety regulations), and that the two local lodge officers who issued notice of the TRO expressed contempt for it. For its part, IAM claims that it personally served every mechanic with a copy of the TRO within days of its issuance, that it immediately posted notice of the TRO on its website and on union-maintained bulletin boards, that its website notice did urge compliance with the TRO (and that its reference to the district court's own language stating that the TRO was not meant to impede the mechanics' compliance with safety regulations was not a signal for a further slowdown), and that Union representatives notified mechanics at stations throughout the county of the need to comply with the TRO.

whom it believed were performing an excessive number of write-ups and identified stations that were suffering a disproportionate number of problems. United asked IAM to counsel the mechanics that it had identified. It also requested the IAM officers who are individual defendants in the case to conduct personal briefings at each work location to "explain what the TRO and status quo means," "explicitly explain that all slowdown messages are no longer valid," and to "convey with absolute sincerity and commitment that they IAM will abide with the TRO." United also asked IAM to remove all materials encouraging the slowdown (including the original IAM bulletin announcing the TRO), and to post the TRO along with two letters from Ford on all bulletin boards. In addition, on November 30, United's counsel told IAM's counsel that United had incurred $66 million in damages due to the mechanic slowdown since the issuance of the TRO.

Immediately thereafter, the situation began to improve. Between December 1 and 10: (1) the number of write-ups dropped to an average of 1,306 per day; (2) the number of out-of-service aircraft decreased to less than 30 per day; (3) the percentage of flights delayed for mechanical reasons dropped to 6.5 percent; and (4) the percentage of maintenance-related flight cancellations dropped to an average of 2.2 percent. These numbers reflected measurable improvement from the levels in place from November 18-30, although they remained significantly higher than historical levels in all categories. Once again, the parties provide conflicting explanations for this turn of events. United argues that the improvement was caused by IAM's belated efforts to abide by the TRO by aggressively discouraging its members from engaging in a work slowdown. IAM counters that the amelioration was due mainly to United's long overdue efforts to address the situation through its own management by terminating, disciplining, or at least counseling some individual mechanics whom it believed were responsible for

the claimed slowdown.[7] IAM also argued that the improvement could be explained, at least in part, by the recent actions that United took against a rival union's[8] website which had been attacking the IAM and expressly calling for a work slowdown among United mechanics.

IAM moved to vacate the TRO on grounds that it did not comply with the procedural requirements of the Norris-LaGuardia Act ("NLGA"). On December 7, 2000, the court denied IAM's motion, but dissolved the TRO sua sponte, stating that there was some proof that the issuance of the TRO "caused some activity on the part of the Union, but at the same time it caused a reaction by those persons who may, as has been alleged, be beyond the control of the Union." The

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[7] IAM contends that United never took any such actions until after the November 27 conference with the court. IAM claims that the November 10 letter from Studdert to Ford was the first time that United had accused IAM of encouraging a slowdown (indeed, at a meeting one week before the letter, IAM claims that United complimented IAM for "keeping the lid on," or for preventing job actions by its members during the tense negotiations). IAM also claims that United gave it specific evidence and the names of individual mechanics engaged in the slowdown only after the November 27 conference, and that IAM later discovered that almost none of those individuals had been disciplined or even counseled by United before United filed suit. United claims that it did discipline hundreds of employees (and fired some) long before filing suit, and that these efforts had little effect in curbing the slowdown until IAM finally got serious about implementing the TRO). It also claims that it had several conversations with IAM about the problem before the Studdert letter (noting that the letter references earlier conversations between United and IAM about the slowdowns).

[8] IAM noted that mechanics who supported the rival union had called for work slowdowns and refusals to work overtime publicly and in writing immediately after United announced its plans to acquire U.S. Airways (a decision vigorously opposed by many United mechanics), and criticized IAM for refusing to do the same. Further, the mechanics supportive of the rival union staged what United believed was a "sick out" in several locations immediately after July 12. After United fired 11of these employees, and disciplined 11 others, the sick out ended.

Court also found that "at this point . . . neither party should perceive any advantage by the issuance of the [TRO],"and that "the compulsive reasons for the issuance of the [TRO] have now subsided. . . ." The court then stated:

> I think the urgency of the [TRO] in the court's mind was because of the pending travel over the Thanksgiving holidays and also what the court perceived, based upon the information the court had then, was perhaps some activity on the part of the Union if not actively attempting to curtail that activity, maybe in a somewhat covert manner to encourage that activity. I think that the allegation of that activity has clearly been dissipated at this point in the court's mind based upon the submissions of the parties that I have received since the order has been in effect . . . . [B]ased upon the information that I have received, the [TRO] has been somewhat ineffective in requiring the mechanics to do their jobs appropriately without false claims of safety issues in order to undermine the ability of United to service its customers.

The court noted that a hearing on United's motion for a preliminary injunction was set for December 13, and it opined that not having the TRO in effect during that period would "give the court an opportunity to view without the order in place the activities of the parties," thereby providing "some guidance as to its findings as to whether or not a preliminary injunction should issue."

After hearing oral argument from the parties, the district court denied United's motions for contempt and for a preliminary injunction without written opinion. In denying the motion for contempt, while the court found that the Union did not "immediately do all actions which ultimately were done," and that the manner of its initial posting of the TRO" perhaps was not the most effective way to garner acquiescence and compliance with the order," the court found

that these failings did not rise to the level of contempt and that the Union eventually" complied not only with the intent but with the letter of the [TRO] by taking those actions which they thought were prudent and escalating those actions when it appeared that they were not effective." The court also stated that" the facts in this case have convinced the court that there are some members of [IAM]'s union who despite their best efforts have continued to, and perhaps will continue to, act inappropriately and to do these job actions which are not proper." In denying the preliminary injunction, the court stated: I think that there is somewhat of a mob mentality out there somewhere where people believe as long as we act in concert and groups we are all safe by the fact that no one can be identified, singled out, and held to pay the consequences of their actions . . . . [T]hose persons being identified and subjected to immediate consequences I think is the best way and maybe the only way to insure that the majority of the members of the union continue to act appropriately in this case. I find that this is a much more effective way to control that membership than it is for the court to issue an order telling people to do what they are legally obligated to do under the various statutes that control this situation.

United has appealed the district court's denial of its motion for preliminary injunction, arguing that the district erred both legally and factually in refusing the injunction on the ground that United could more effectively end the slowdown by disciplining and/or terminating those individual mechanics responsible. IAM argues that the district court correctly perceived that the NLGA precluded the injunction unless it would have been the "sole, effective means" of solving the problem, and that the court correctly found that such was not the case here. In addition, IAM argues that §§ 106, 107(a), and 108 of the NLGA barred the injunction, because there is no "clear proof" that the IAM authorized, encouraged or ratified the slowdown, and because United did not make

"every reasonable effort to resolve the dispute" before seeking the injunction.

## DISCUSSION

In reviewing the denial of a preliminary injunction, we review the district court's findings of fact for clear error, its balancing of the factors for a preliminary injunction under the abuse of discretion standard, and its legal conclusions de novo. See *Kiel v. City of Kenosha*, 236 F.3d 814, 815 (7th Cir.2000) (citation omitted); *Teamsters Local Unions Nos. 75 and 200 v. Barry Trucking, Inc.*, 176 F.3d 1004, 1011 (7th Cir.1999). We accord substantial deference to the trial court's decision because we "recognize the advantage of the trial court's proximity to the evidence." See *Teamsters*, 176 F.3d at 1011. Therefore, we will not find a district court's factual finding clearly erroneous if it is "plausible in light of the record viewed in its entirety," even if we would have "'weighed the evidence differently' and reached the opposite conclusion." See *Air Line Pilots Ass'n Int'l v. United Air Lines, Inc.*, 802 F.2d 886, 891 (7th Cir.1986) (citation omitted) ("ALPA"). However, the lower court necessarily abuses its discretion when it commits an error of law, see *MacDonald v. Chicago Park District*, 132 F.3d 355, 357 (7th Cir. 1997) (citation omitted), and a decision to deny a preliminary injunction that is premised on an error of law is entitled to no deference and must be reversed. See, e.g., *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 2001WL 42399, *5 (11th Cir. 2001) (citations omitted).

The RLA was enacted, among other reasons, "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein," and "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." 45 U.S.C. § 151a. The intent of the RLA is "to encourage collective bargaining by the parties 'in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce.'" *ALPA*, 802 F.2d at

895 (quoting *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 148 (1969) (footnote omitted)). To effectuate these purposes, the RLA imposes a substantive duty upon" all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. sec. 152, First. This duty runs both to management and to labor, and it has been described as the "heart" of the RLA. See *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969). Moreover, the duty to exert every reasonable effort to make and maintain agreements is a substantive legal duty which is enforceable by the courts. *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 577 (1971) ("[W]e think it plain that [45 U.S.C. sec. 152,First] was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis.")

The RLA sets forth a detailed sequence of steps that carriers and their employees (or their employees' representatives) must follow in negotiating CBAs. First, the party seeking a change in rates of pay, rules or working conditions must give notice and confer with the other party. 45 U.S.C. § 156. If the parties remain unable to resolve their dispute after this conference, either or both of them may seek mediation by the NMB. See 45 U.S.C. § 155. If the mediation fails to produce agreement, the NMB must attempt to persuade the parties to submit to binding arbitration. If either or both of the parties rejects the offer of arbitration and the dispute threatens" substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of substantial transportation service," the NMB must contact the President who may then create an emergency

board to "investigate and report respecting such dispute." 45U.S.C. § 160. If the NMB releases the parties from mediation before an agreement has been reached, the RLA imposes a 30-day "cooling-off" period upon the parties. Throughout this entire lengthy negotiation process, carriers and unions are required to maintain the status quo with respect to rates of pay, rules, and working conditions. See 45 U.S.C. §§ 155, 156. The status quo provisions are "central" to the RLA's design, see *Shore Line*, 396 U.S. at 150, and they "must be read in conjunction with the implicit status quo requirement in the obligation imposed upon both parties by [§ 152], First 'to exert every reasonable effort' to settle disputes without interruption to interstate commerce" as part of an" integrated, harmonious scheme for preserving the status quo from the beginning of a major dispute through the final 30-day 'cooling-off' period." *Id.*at 151, 152. If either side unilaterally alters the status quo during the bargaining and mediation process, a court may issue an injunction to put a stop to that party's illegal self-help and to restore the status quo, and it may do so even without the traditional showing of irreparable injury to the other party. See *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n.*, 491 U.S. 299, 303(1989). This rule authorizes courts to enjoin not only strikes but also "union conduct . . . which has the consequences of a strike," such as refusal of overtime, slowdowns, and sit-ins. See generally *ALPA*, 802 F.2d at 906 (citation omitted).

However, when a carrier seeks an injunction against a union, "a court must look not only to the RLA but also to the NLGA to determine whether the court has jurisdiction." See *Delta Air Lines*, 2001 WL 42399 at *4. As a general rule the NLGA strips courts of jurisdiction to enter injunctions against labor unions incases growing out of labor disputes," express[ing] a basic policy against the injunction of activities of labor unions." *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 772 (1961). The NLGA also provides that "no injunction or temporary restraining order shall be issued on

account of any threat or unlawful act excepting against the . . .organization making the threat or committing the unlawful act or actually ratifying the same after actual knowledge thereof," 29 U.S.C. § 107(a), and that"[n]o . . . organization participating or interested in a labor dispute shall be held responsible or liable . . . for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 29 U.S.C. § 106. In seeking to accommodate the conflicting provisions of the RLA and the NLGA, the Supreme Court has held that where a challenged action violates specific provisions of the RLA (such as the status quo provision of 45 U.S.C. § 152, First), "the specific provisions of the [RLA] take precedence over the more general provisions of the [NLGA]," *see Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 513 (1989) (quotation omitted); see also *Chicago & North Western Ry.*, 402 U.S. at 581; *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 41-42 (1957), and courts can issue injunctions to enforce the RLA provisions at issue notwithstanding the NLGA.[9] In other words, the Court has carved out an exception from the NLGA's general prohibition on injunctive relief against union activity for violations of specific provisions of the RLA. However, the Court has stated that this exception is a limited one which applies only

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[9] However, when a carrier seeks to enjoin a strike against a union under the status quo provisions of the RLA, the procedural provisions of the NLGA remain in effect. See *Delta Air Lines*, 2001 WL42399 at *7. For example, a carrier seeking an injunction against a union must put on live testimony with the opportunity for cross-examination, see 29 U.S.C. § 107, or there must at least be some equivalent guarantee of the reliability of the evidence presented. See *Delta*, 2001 WL 42399 at *7. However, in this case the parties stipulated to submit their case to the district court on the written record (through affidavits and briefs) without live testimony, Dec. 13 Trans. at 4, and IAM has not raised any issue of its right to cross-examination either here or below. Thus, the issue is waived.

if an injunction is the "only, practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements," see *Chicago & North Western Ry.*, 402 U.S. at 583, or if "that remedy alone can effectively guard the plaintiff's right." *Id.* at 582 (quotation omitted).

United argues that the district court misapplied the law and abused its discretion in denying its motion for a preliminary injunction under the RLA. First, United contends that since the court found that some of its mechanics were engaging in a concerted job action (that is, a deliberate slowdown) during the mediation process, United was entitled under the RLA to an injunction ordering the union to make every reasonable effort to stop the slowdown even if it could not be determined whether the injunction against the union would have been entirely effective in ending it. Therefore, United asserts that the district court erred as a matter of law when it decided not to issue the injunction solely on the ground that it would be more "effective" for United to address the problem by disciplining or firing the individual workers who were responsible for the slowdown. IAM counters that, given the proscriptions of the NLGA, status quo injunctions can only issue against a union when the injunction would be the "only practical, effective means" of enforcing the RLA, and that the district court was therefore required to inquire into the effectiveness of the injunction, and to deny it once it legitimately concluded that United could more effectively address the problem through management efforts.

We agree with United. While it is true that, given the goals of the NLGA, courts should hesitate to issue an injunction unless it is the "sole effective means," to address the RLA violation, IAM cites no authority (nor have we found any) for the proposition that a district court must deny a preliminary injunction against a recognized violation of a specific provision of the RLA by union members if it determines that the employer could "more effectively" curb the violation by

directly disciplining or terminating individual employees. Indeed, such a suggestion runs counter to the spirit of the RLA's status quo provisions. As noted, those provisions impose an affirmative legal duty upon both employers and unions alike—which is enforceable by the courts—to preserve the status quo during the bargaining and mediation process imposed by the RLA. A union has the affirmative duty under the status quo provisions of the RLA to exert every reasonable effort to prevent or discourage a strike or a concerted work action like the slowdown in this case. See, e.g., *Delta Air Lines*, 2001 WL 42399at *6; see generally *Shore Line*, 396 U.S. at 152-53. Once a court determines that such a concerted work action is occurring in violation of the RLA, an injunction can issue ordering the union to observe its statutory duty by trying to stop it. *See, e.g.*, Delta 2001 WL 42399 at *6. Whether United can diminish or even stop the work slowdown through its own actions has nothing to do with the IAM's enforceable duty to do everything reasonable to end it. To hold otherwise would be to deny the union's independent obligations under the RLA. This is not to say, however, that the limitations placed upon the issuance of injunctions against unions which violate their status quo obligations under the RLA cases are insubstantial. It remains true that courts should only enjoin such violations when the injunction would be the "sole practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements." This clearly implies that where there are other effective means available to accomplish that end, injunctions should not issue. However, requiring United to take efforts to end the slowdown would not be an "effective means" of enforcing IAM's duty to "exert every reasonable effort to make and maintain agreements"; rather, it would be requiring United to assume IAM's duty altogether. Indeed, if we were to accept the premise that a carrier's ability to fire or discipline individual employees is an "effective" remedy for a union's status quo violations, a

status quo injunction could never issue against a union, since in virtually every case an employer presumably could take some such measures. Such an interpretation would eviscerate the status quo provisions of the RLA. Therefore, we find that the district court's decision in this case was not justifiable, much less mandated, by the NLGA. To the extent that the district court may have concluded otherwise, it erred as a matter of law.[10]

For similar reasons, we also reject IAM's argument that § 8 of the NLGA bars United from seeking injunctive relief in this case. That section provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or arbitration.

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[10] The cases cited by IAM on this point do not compel a different conclusion. In *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), the Court overturned a blanket injunction brought by railway union members to enjoin their union from violating the RLA by spending funds exacted from union members on political causes, where the injunction restrained the union from collecting any funds from the objecting members. The court held that, because this injunction was overbroad (that is, because the plaintiff's rights could be effectively vindicated by a more narrowly tailored injunction) it was not the only effective remedy available, and was therefore impermissible under the NLGA. The Court remanded for the district court to impose a more narrowly tailored remedy, suggesting that a narrower injunction would be appropriate. In *Chicago & North Western R.R. Co.*, 402 U.S. 570 (1971), the court reversed a lower court's determination that sec. 152, First was not a legal obligation enforceable against a union by injunction, and remanded for the lower court to determine whether a strike injunction sought by the carrier in that case was the "only practical, effective means" of enforcing that section of the RLA. Neither case stands for the proposition that a court must deny an injunction against an illegal work action if it appears that the carrier could more effectively address the problem through management.

29 U.S.C. § 108. This section is applicable to injunctions sought by carriers against unions under the status quo provisions of the RLA. See generally *ALPA*, 802 F.2d at 900, 905-06. By its terms, this "clean hands" provision precludes a carrier involved in a labor dispute with a union from obtaining injunctive relief when the carrier has either: (1) violated a legal obligation with respect to the labor dispute in question; or (2) failed to make every reasonable effort to settle the labor dispute either through negotiation, mediation, or arbitration. See *Brotherhood of R.R. Trainmen Enterprise Lodge, No. 27 v. Toledo, P. & W.R.R.*, 321U.S. 50 (1944) (holding that, while the RLA does not require either party to a major labor dispute to submit to arbitration, a carrier who refuses this available avenue for settlement cannot obtain injunctive relief under the status quo provisions).

IAM argues that United did not make every "reasonable effort to settle" the dispute in this case, claiming that United made virtually no attempt to resolve the slowdown through negotiations with IAM before it filed suit. IAM claims that Studdert's November 10 letter to Ford was the first and only time that United mentioned the problem to IAM officials before seeking the injunction, and that the letter was in fact sent immediately after United had thanked IAM for "keeping the lid on" and averting serious work actions during a tense period of negotiations. United disputes these assertions, but we need not credit United's version of the story to dispose of IAM's claim. Section 8 requires a party to a labor dispute to "exert every reasonable effort" to settle the labor dispute in question (through negotiation, mediation or arbitration) before seeking to enjoin an action by the other party which relates to the dispute. It does not require a party who is already engaging in good-faith effort to settle the labor dispute through negotiation, mediation, or arbitration to "exert every reasonable effort" to prevent or end an unlawful strike or work action before seeking judicial relief. Indeed, requiring a carrier to seek a negotiated solution before

moving to enjoin an illegal work action would enable unions to use such actions to extort concessions from the carrier during the negotiation process. Such a result would render the union's duty under 45 U.S.C. § 152, First a nullity, and would run directly contrary to the policy rationales of the RLA's status quo provisions. If IAM had demonstrated that United had either violated its own status quo obligations (or some other duty under the labor laws) or had failed to pursue all of the available channels of negotiation, mediation, and arbitration provided under the RLA, then it would have a stronger case for barring the injunction under § 8 of the NLGA. However, as IAM has not made any such contention, we must reject its argument under sec. 8.[11]

Moreover, it seems clear in this case that an injunction would be the "sole, effective means" of enforcing the IAM's duties under the status quo provisions of the RLA. The district court concluded that a number of United mechanics were engaging in a deliberate and unlawful slowdown (or that

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[11] We should note, however, that even if IAM had demonstrated some such action on United's part, it still might not be able to block United from obtaining the injunction it seeks. We have not read § 8 of the NLGA as forming an absolute bar to injunctive relief against status quo violations when the party seeking the injunction has violated either its own status quo obligations or some other legal obligation. See *ALPA*, 802 F.2d at 901. Rather, we have "weigh[ed] the competing equities to determine whether applying section 8's bar to injunctive relief would serve to further underlying purposes of both the RLA and the [NGLA]." In so doing, we have expressly noted that the imperatives of the RLA may over-ride sec. 8, and that a party's lack of "clean hands" under sec. 8 "may be overcome by a balancing of the interests, particularly where it is the public interest involved." See *Illinois Central R.R. Co. v. Brotherhood of R.R. Trainmen*, 398 F.2d 973, 976 (7th Cir. 1968) (quotation omitted). While we do not decide the matter, we note that United could make a strong argument here that both the balancing of hardships and the public interest weigh in favor of the issuance of the injunction in this case, and that therefore the injunction could have been granted even if United had violated § 8 of the NLGA.

a number of mechanics were "do[ing] job actions which are not proper" and acting "in concert" or in a" mob mentality"). This unilateral resort to self-help on the part of union members puts severe economic pressures on United, thereby undermining its bargaining position during the period of negotiation and mediation. This is precisely the kind of action that the RLA status quo provisions seek to prevent, and we cannot conclude that other remedies, short of an injunction, would be effective in doing so. Cf. *Int'l Ass'n of Machinists & Aerospace Workers v. Transportes Aereos Mercantiles Pan Americandos*, S.A., 924 F.2d 1005, 1011 (11th Cir. 1991).

IAM also argues that sec. sec. 6 and 7(a) of the NLGA prohibit the issuance of a preliminary injunction against it. Section 7 limits the jurisdiction of the federal courts to issue injunctions in cases involving or growing out of a labor dispute, and subsection (a) provides in part that "no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof." 29 U.S.C. § 107(a). Section 6 provides in part that "no association or organization participating or interested in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 29 U.S.C. § 106. In ALPA, we ruled that a carrier could not establish that a union had committed a status quo violation by means of an orchestrated "sick-out" without proving by clear and convincing evidence that the union had promoted the alleged sick-out, and that statistical evidence showing that pilots had taken twice their usual number of sick days during the relevant time period was insufficient by itself to implicate the union under this "clear proof" standard. *See ALPA*, 802

F.2d at 905-06. IAM argues that, even if some United mechanics were engaging in a work slowdown, United has not offered "clear proof" that IAM authorized or ratified the slowdown. IAM maintains that it had repeatedly counseled its mechanics not to engage in any job action, and that many of the "work safe" bulletins and flyers that United offered as evidence of a concerted slowdown were written not by IAM but by "strident opponents" of IAM (i.e., by mechanics or others who were sympathetic with a rival union and hostile to IAM). IAM also asserts that any "work safe" language appearing in those bulletins that it did publish meant only what it said and was intended innocently. For example, IAM claims that the "work safe" language contained in the District 141-M bulletin of October 13 was inserted in response to United's concerns regarding recent workplace accidents. Moreover, IAM contends that the increases in write-ups and other maintenance-related anomalies experienced by United could have been caused by only a "few dissident mechanics."

We find that United has offered enough "clear proof" of IAM's involvement in the work slowdown to satisfy the standard of § 6. While it is true that statistics alone will not provide clear proof of a union's involvement in a work action, United did not rely on statistical evidence alone. In fact, it presented evidence of the kind that we have expressly suggested would establish a union's responsibility for authorizing or ratifying a work action under § 6. See *ALPA*, 802 F.2d at 905. United produced a number of IAM bulletins which included prominently displayed exhortations to "work safe." Moreover, United produced testimony from some of its maintenance officials that a union's suggestions to its mechanics to "work safe" or to "work by the book" are commonly recognized signals among union mechanics for a work slowdown. IAM has not challenged this testimony, and courts have found similar language to be "codes" for job actions. *See, e.g., The New York Times Co. v. Newspaper & Mail Deliverers Union*, 740 F. Supp. 240, 244 (S.D.N.Y.

1990) (finding that a union chapel chairman's directive to members to "adhere to strict contractual requirements in making their deliveries" was a call for a "slowdown from normal operations"); *Tex. Int'l Airlines, Inc. v. Air Line Pilots Ass'n Int'l*, 518 F. Supp. 203, 210-11 (S.D. Tex. 1981) (finding that council chairman's letter to union members advising them to "adhere to company policies, and contractual agreements"; "not to neglect even the most minor write ups"; . . . and "to check every item on the checklists" was sent with the understanding that pilots would interpret it as a call for a slowdown). Further, while IAM claims that it did not publish many of these bulletins, it admits to publishing some of them (for example, the District Lodge 141-M bulletin published on October 13, and the October 19 bulletin issued by Local Lodge 2294 in Indianapolis). IAM offers no satisfying explanation for why these bulletins included—indeed, trumpeted—the message to WORK SAFE! in the context of blaming United for the lack of progress in the negotiations or of criticizing United for its recent oppressive management actions. Nor does IAM explain why the language telling mechanics to "work safe" was the only language written in bold face, underlined, or in all capital letters. While some of these bulletins also contain statements urging members not to "engage in any job action," such statements are dwarfed by the messages to "work safe," leaving the clear impression that the relatively inconspicuous statements discouraging a slowdown were not meant to be taken at face value. Given the context in which the "work safe" messages appeared and the prominent nature of their display, their obvious intent was to urge mechanics to engage in a work slowdown in response to the impasse in negotiations. In addition, given that IAM does not deny that such language can serve as a code for a slowdown, we find it difficult to believe that IAM would have included such language in the context of bulletins regarding negotiations (especially at a time when it claims that bulletins bearing the

same code language were being distributed by dissident mechanics as a call for a slowdown) unless it intended to signal the mechanics to engage in a slowdown.

In addition, although it denies responsibility for their authorship, IAM does not satisfactorily explain how even more suspicious bulletins came to be distributed in three United maintenance centers in late October or early November, at least one of which was placed in a locked IAM bulletin board. These bulletins were issued under the headings "Negotiations 2000," "Millennium Negotiations," and "Lodge 1781 Strike Committee,"[12] and they each urged mechanics (in virtually identical language) to clean their boxes and tools "daily" and to "shut down and fix" anything that isn't safe, in keeping with the "safety first ideal." This is exactly the kind of evidence that we have suggested could provide "clear proof" of a union's authorization of a slowdown. See *ALPA*, 802 F.2d at 905 (suggesting that statistical evidence of a sick-out plus, *inter alia*, "a notice posted on a union bulletin board" could indicate union involvement in a sick-out under § 6) (discussing *Pan American World Airways, Inc. v. Independent Union of Flight Attendants*, 93 Lab. Cas. (CCH) ¶¶ 13,307, 20,035 (S.D.N.Y.

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[12] The latter bulletin bore a cartoon of a wolf and stated "Wolf, play it safe, negotiate," and it purported to be from a committee that IAM claims does not exist. Third Supp. Dec. of Ford at para. 4. Steve Wolf was the former CEO of United (in the early 1990's). *Id.*; Dec. 13 Trans. at 43.This arguably suggests that the "wolf" bulletin was created several years ago, and not in connection with the events at issue in this case. Moreover, as IAM notes, United Vice President of Line Maintenance William Norman admitted in his deposition that he did not know whether IAM actually published this bulletin, or when it was published. Norman Dep. at 81-82. However, even assuming that this bulletin was published in the early 1990's, IAM has not explained how it came to be recirculated in October and November of 2000, nor has it explained why a bulletin with a substantially identical message (and without any reference to Wolf) appeared simultaneously in a locked IAM bulletin board at another location.

July 20, 1981) (finding evidence of union involvement in a sick-out sufficient to support an injunction where, inter alia, the union did not take sufficient steps to disavow a planned sick-out by its members and where an unsigned notice reporting on the negotiations and indirectly calling for the sick-out was posted on a locked union bulletin board to which only the union had access)). When this evidence is considered alongside United's compelling statistical evidence, which suggests that the work slowdown began to abate just as IAM stepped up its efforts to discourage it in late November, IAM's involvement in the slowdown becomes all the more apparent. Thus, while it is not clear that the district court found that IAM had not authorized the slowdown,[13] even if it did, we would find such a finding clearly erroneous.

Finally, IAM argues that even if the NLGA did not dictate the result reached by the district court, the court nevertheless had the discretion under traditional principles of equity to deny the injunction—notwithstanding the provisions of the RLA—if it found that the injunction would not effectively provide United with the relief it sought. *See, e.g., Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 550 (1937). IAM contends that the district court found that the injunction would be ineffective after carefully considering the record evidence, which suggested that the TRO had been relatively ineffective in restoring the status quo and that the situation

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[13] IAM claims that in dissolving the TRO, the district court found that IAM was not responsible for the alleged slowdown when it stated that the initial "allegation" that the IAM was covertly encouraging the slowdown had "clearly been dissipated . . . ." However, read in context, this statement seems to indicate that the district court believed that IAM was no longer encouraging the slowdown (after the TRO had been issued), not that it never had encouraged it. Some statements that the court made during the December 13 hearing on the preliminary injunction do suggest that the court believed that certain union members were engaging in a wildcat work action, "despite [IAM]'s best efforts." However, it is far from clear that the court actually made a finding on this issue.

had not worsened appreciably for United once the TRO was dissolved. Therefore, IAM maintains that the district court's factual finding that the injunction would be similarly ineffective was not clearly erroneous, and must be affirmed. We reject this argument. The record does not support an inference that the injunction would be ineffective. To the contrary, the statistical evidence before the district court suggested that, while the TRO did not succeed in bringing the rates of write ups, planes held out of service, and maintenance-related cancellations and delays to historical levels, it did have a substantial positive effect after the IAM sought to implement it more aggressively. We find IAM's contention that this positive effect was due solely to United's belated efforts to counsel and to take disciplinary action against offending mechanics unpersuasive in light of United's submissions that it did take such actions earlier, and that such actions had little effect. Moreover, even assuming that United's management efforts were partly responsible for the positive trend (which, we note, the district court did not expressly find), we find no plausible basis for the conclusion that an injunction against the union would not have an additional positive effect. Even if we were to agree that United could achieve favorable results by disciplining individual mechanics, the evidence suggests that it could achieve even more favorable results if, in addition, the injunction were in place. Given all of this, and considering that in issuing the TRO the district court found that the traditional equitable factors—including the balance of hardships and the public interest--weighed in favor of granting the injunction and that it never expressly found to the contrary, we see no equitable reason to withhold injunctive relief in this case.[14]

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[14] IAM argues that an injunction would not be the most effective means to "address conduct of mechanics engaged in safety sensitive work," to" address conduct that is intertwined with constitutionally protected

Moreover, we note that the district court did not expressly find that the injunction would be wholly ineffective. Rather, in dissolving the TRO it found that the TRO had been "somewhat ineffective," and in denying United's motion for a preliminary injunction it found merely that it would be "more effective" for United to try to resolve the problem through management. This latter finding seems to be the basis for the court's decision, and the court unfortunately provided very little support for the finding. In any event, we hold that the court misapplied the law in basing its decision on such a finding. The court concluded that some United mechanics were engaging in a work slowdown in violation of the RLA, and as we have already demonstrated, the evidence established IAM's involvement in the illegal slowdown. As we have noted, under these circumstances a court may issue an injunction against a union as the "sole, effective means" of enforcing the union to observe its obligations under the RLA's status quo provisions, and a carrier's efforts to solve the problem through management are no substitute for judicial enforcement of the union's independent obligations.

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speech," or to "address the problem of dissident mechanics." We are not persuaded. First, courts have enjoined illegal work actions undertaken under the guise of safety, see, e.g., *Long Island R.R. Co. v. Sys. Fed'n No. 156*, 368 F.2d 50, 52 (2d Cir. 1966), and IAM offers nothing to suggest that courts could not frame injunctive orders carefully to ensure that legitimate safety inspections are not compromised. (Indeed, the district court in this case did just that with respect to the TRO). In addition, enjoining a union from encouraging illegal job actions (or forcing it to discourage such action) during the limited period of negotiation and mediation would not intrude on constitutionally protected speech, as it would leave the union free to criticize the company's bar-gaining position. Finally, we reject IAM's argument that the injunction would be ineffective because the slowdown was caused by dissident mechanics, both because we find that the evidence establishes IAM's involvement, and because the statistical evidence strongly suggested that IAM's efforts to implement the TRO in late November were having an appreciable effect on the slowdown.

*See National Airlines, Inc. v. Int'l Ass'n of Machinists and Aerospace Workers*, 416 F.2d 998, 1006 n.7 (5th Cir. 1969) (stating that "[t]he primary responsibility for ending [a] strike [in violation of the RLA] rest[s] in the district court"). Therefore, by denying an injunction against IAM's illegal job action solely on the grounds that the problem could be more effectively addressed by United, the court denied United a judicial remedy to which it was entitled under the RLA and erred as a matter of law.

## CONCLUSION

We have considered IAM's other arguments, and find them meritless. For the foregoing reasons, we REVERSE the decision of the district court, and REMAND with instructions to enter the preliminary injunction against IAM and to fix a date for trial on the issue of a permanent injunction in as short a time as is reasonably possible. REVERSED and REMANDED.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Docket No. 00 C 7265
Chicago, Illinois

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UNITED AIR LINES, INC.,
*Plaintiff,*

v.

INTERNATIONAL ASSOCIATION of MACHINISTS
and AEROSPACE WORKERS, *et al.*,
*Defendants.*

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM J. HIBBLER

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[4]

THE CLERK: 00 C 7265, *United Air Lines v International Association of Machinists*, hearing.

* * * *

THE COURT: Thank you.

Let me deal first with the contempt motion which is pending before this court. Upon the issuance of the temporary restraining order on the 17th of November, clearly, there was a discussion before the court in which the court was apprised of one difficulty with the restraining order, which was brought to the court's attention by the defense, that the order in its original form might be confusing to the membership in terms of chilling their desire to do their jobs in a normal way, which might include finding safety violations which they were then perplexed as to whether or not they could continue

to note those violations without appearing to be in violation of the restraining order. And I thought that that was a reasonable concern.

Clearly, I think—and let me just say this in terms of [68] the overall actions on the part of both sides—I think in times of negotiations each side has shown a tremendous amount of restraint. I think that is true of the airline because as I read the various declarations and affidavits that were submitted to the court and learned of certain terminations recently, those were actions which in my mind certainly could have been taken by management much sooner based upon the activity of individual mechanics.

Once the temporary restraining order was issued, the court finds that the Union did not immediately do all actions which ultimately were done. I think that they did immediately post the temporary restraining order. It was publicized that that order required the mechanics to work in their normal fashion. But the Union also notified their personnel that they felt that the order might be inappropriately issued and that they would be seeking relief from the order at some future date.

Clearly, that perhaps was not the most effective way to garner acquiescence and compliance with the order, but I think they had reasons that were reasonable which required that they say that in order to keep their membership advised as to what they were doing as their representatives. I don't think it was as effective by including those two things together as it would be to give information about the temporary restraining order and separately advise regarding other actions that they might be taking.

[69]

I don't find doing it in the way which they did, I do not find that there was any attempt to diminish or evade the restraining order. I think it was a matter of doing it expeditiously as opposed to perhaps doing it in a way that

would most effectuate the restraining order. Subsequent to the issuance of the restraining order, there was also discussions before the court indicating that the Company had certain suggestions which they would be making as to effectuate the restraining order, and I believe based upon the submissions I have, many of those suggestions not only were given to the Union but were acted on by the Union.

Now, I do not find that it is incumbent upon the Union to do everything that the Company asked them to do in exactly the fashion that the Company asked them to do that. There is a need, I think, for them to make independent judgments as to what they can effectively do with their membership that would not so undermine their relationship with their membership as to cause them to become ineffective.

I also believe that the facts in this case have convinced the court that there are some members of their union who despite their best efforts have continued to, and perhaps will continue to, act inappropriately and to do these job actions which are not proper.

I don't believe that the temporary restraining order or human nature convinces me that there can be instantaneous [70] absolutely compliance to the highest degree with such orders. I think it is a process which must evolve. And I think based upon the actions of the Union in this case that they have complied not only with the intent but with the letter of the temporary restraining order by taking those actions which they thought were prudent and escalating those actions when it appeared that they were not effective.

Although there was some delay, I do not find that that delay was intended to undermine the temporary restraining order, I do not find that their actions were in contempt of that order, and therefore, the motion to hold the Union in contempt for failure to comply with the temporary restraining order will be denied.

As to the motion for the preliminary injunction, again, going back to what I believe is perhaps the most effective way to deal with, I find, a certain element of the Union which is resistant to leadership, I think those persons, as I suggested previously, had to be identified, the Union needed to be notified of who those persons were, and appropriate action should be taken against the individuals who are continuing to impact United in its ability to service its customers.

In all candor, I think there is somewhat of a mob mentality out there somewhere where people believe as long as we act in concert and groups we are all safe by the fact that no one can be identified, singled out, and held to pay the [71] consequences of their actions. Maybe the parties disagree, but I think those actions in which certain individuals who have been identified as writing up safety violations inappropriately or failing to do them timely, those persons being identified and subjected to immediate consequences I think is the best way and maybe the only way to insure that the majority of the members of the Union continue to act appropriately in this case. I find that is a much more effective way to control that membership than it is for the court to issue an order telling people to do what they are legally obligated to do under the consequences of their actions. Maybe the parties disagree, but I think those actions in which certain individuals who have been identified as writing up safety violations inappropriately or failing to do them timely, those persons being identified and subjected to immediate consequences I think is the best way and maybe the only way to insure that the majority of the members of the Union continue to act appropriately in this case. I find that is a much more effective way to control that membership than it is for the court to issue an order telling people to do what they are legally obligated to do under the various statutes that control this situation.

I find in the court's mind that there is no need for a preliminary injunction in this case. It would certainly seem to

the court that--and let me just make a point because I think it is important. I do not believe that either side is motivated in this case by anything other than their commitment to do what is best for their respective client. I do not believe that this action was brought by the Company in order to affect the ongoing negotiations, but I think what happens is when people get involved with such emotionally charged situations where negotiations are underway, things get tense and people look for ulterior motives for every action, and I just don't think they lie.

It seems to me at this point, as I suggested I was going to do last week in eliminating the temporary restraining order, [72] that there has been no detrimental impact, based upon the court's review of the materials that have been supplied, based upon the dissolution of the temporary restraining order.

I see no purpose, as I was about to say, in a preliminary injunction in this case because I think that the Union understands its role in making sure that its membership continues to work in an appropriate fashion. I think that both sides are probably wise enough in negotiations to know that any action of a precipitous nature by either side serves no useful purpose in attempting to get the entire matter resolved with a new contract, and therefore, the motion for a preliminary injunction the court finds does not lie and that motion likewise will be denied.

Yes, sir.

MR. SIEGEL: Your Honor, if I could just ask, I think I'm compelled to ask, the Company may wish to take an emergency appeal to the Seventh Circuit and I believe I'm required to ask your Honor first if this court would be willing to entertain any request for a short interim injunction pending the completion of an expedited appeal.

THE COURT: I do not find that an interim injunction would be appropriate, and so I will deny that request.

MR. Thank you, your Honor.

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[73]

I certify that the above is a true and correct transcript of proceedings had in the above-entitled matter.

/s/ Lois A. LaCorte
Lois A. LaCorte

## APPENDIX C

[Filed April 11, 2001]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

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No. 00-4220

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UNITED AIR LINES, INCORPORATED,
*Plaintiff-Appellant,*

v.

INTERNATIONAL ASSOCIATION OF MACHINIST AND AEROSPACE WORKERS, ETC., *et al.*,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 00 C 7265

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ORDER

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Before: Hon. WILLIAM J. BAUER, *Circuit Judge*, Hon. JOHN L. COFFEY, *Circuit Judge*, Hon. DANIEL A. MANION, *Circuit Judge*

William J. Hibbler, *Judge*.

On consideration of the "petition for rehearing and suggestion for rehearing *en banc*, and motion to recall mandate of defendants/appellees", etc., no judge in active service has requested a vote thereon * and all of the judges on the original panel have voted to deny. Therefore the petition for rehearing is DENIED.

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* The Honorable Joel M. Flaum took no part in the consideration of this petition.